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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 805

AKSHUN MANUFACTURING COMPANY, ET AL.,
Petitioners,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

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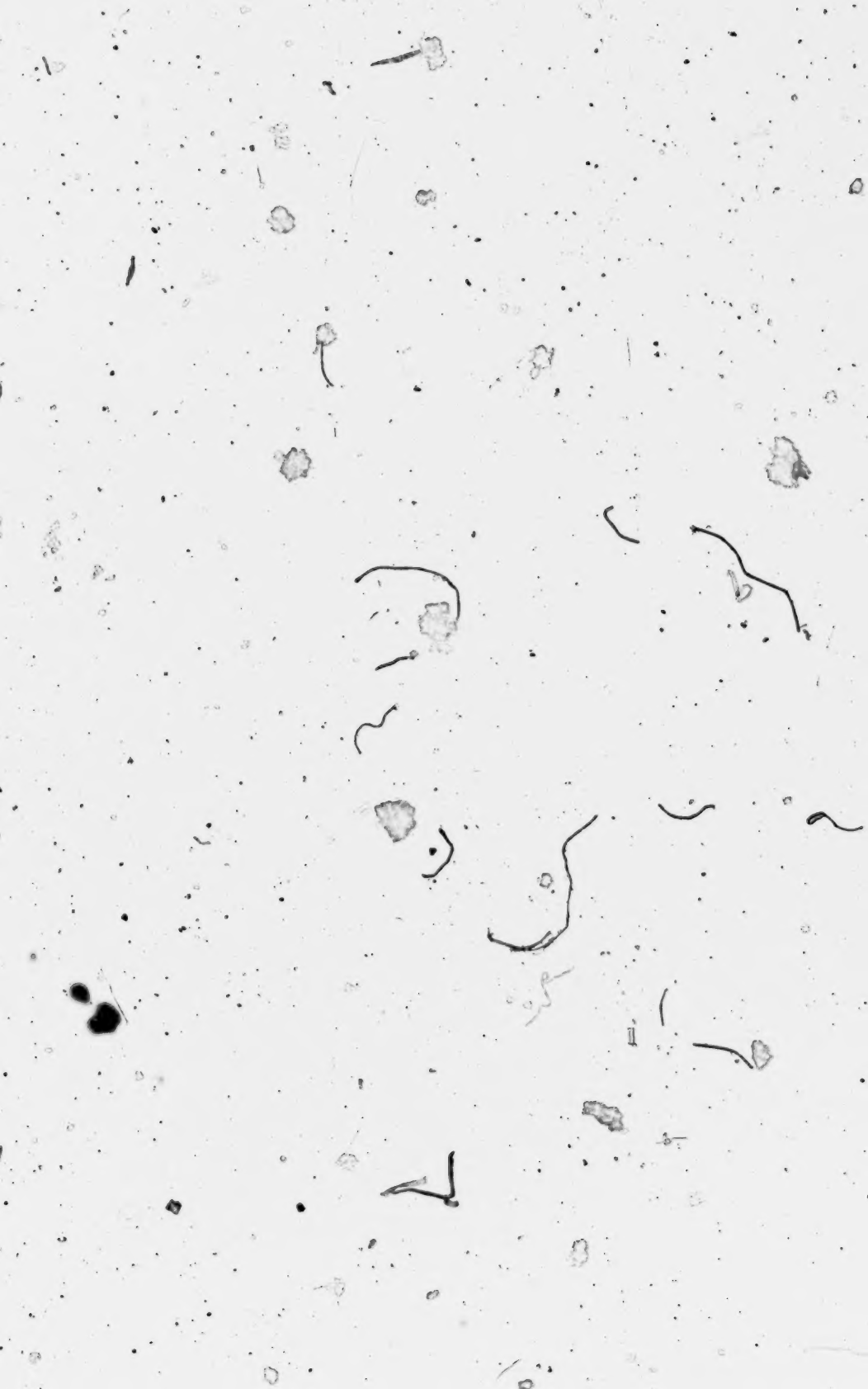

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To The Honorable Chief Justice and the Associate Justices of the Supreme Court of the United States:

JURISDICTION.

The jurisdictional requisites are adequately presented in the Petition.

QUESTIONS PRESENTED.

The Petition for a Writ of Certiorari raises the same issues that were presented to the Court of Appeals by the Petition under Rule 60(b). (Record, Petition under Rule 60(b), page 5.) The Court of Appeals thoroughly considered the charges of petitioners and the denials of respond-

ent, and ordered that the Petition under Rule 60(b) be denied. (Appendix A to the Petition for Certiorari.)

Question I in the Petition.

The first question presented is whether the Petition under Rule 60(b) was timely filed. The Petition under Rule 60(b) was filed May 17, 1963, about fourteen months after the decision of the Court of Appeals (March 20, 1962). On May 21, 1963, the Court of Appeals ordered North Star to answer the Petition of May 17, 1963, within twenty days. (Record, CA 7, Order May 21, 1963.) On June 10, 1963, North Star filed its answer of 26 pages including 10 affidavits totaling 50 pages. (Petitioners' Appendix, B-2; Record, North Star Answer to Petition under Rule 60(b).) The answer vigorously denied the unfounded allegations of fraud and conclusively showed that in fact there was no fraud. (Record, North Star Answer, pages 4-9; item 4. on list of papers forwarded to this Court by Clerk of Court of Appeals—Appendix 1 herein.) The charges of fraud are baseless.*

With the Petition and the material from North Star's Answer before it, on July 30, 1963, the Court of Appeals denied the Petition under Rule 60(b) on the merits, stating:

> "The Court being fully advised of the issues raised by the Petition of Akshun Manufacturing Company, and the answer thereto filed by North Star Ice Equipment Company
>
> . . . . . .
>
> "IT IS FURTHER ORDERED, that the Petition filed by Akshun Manufacturing Company, that our judgment

* The document, Exhibit 20 (referred to on pages 10, 20 and 25 of the Petition) has always had a drawing like the one petitioners complain about (lower drawing, page 10 of the Petition); (Record, North Star Answer, page 16). Respondent placed Exhibit 20 in evidence in the District Court and included it as a part of the record before the Court of Appeals.

herein dated March 20, 1962 be vacated, and for alternative relief, be and the same is hereby denied." (Petitioners' Appendix, A-2.)

Subsequently, on August 28, 1963, petitioners delivered a request for rehearing to the Clerk of the Court of Appeals. The rules of the Court of Appeals for the Seventh Circuit do not provide for the filing of any such request, and the request for rehearing remained in the Clerk's office pending the further order of the Court. On November 5, 1963, the Court of Appeals ordered the request for rehearing to be filed and denied the same. In the order of November 5, 1963, the Court of Appeals restated the chronology of decisions and pleadings set out above and stated a second reason for denying the Petition under Rule 60(b) of May 17, 1963, *i.e.*, it was not timely as it was filed more than one year after the date of the decision of the Court.

The Court of Appeals' decision of July 30, 1963 (Appendix A to the Petition) denying the Petition under Rule 60(b) for lack of merit renders any question of timeliness of the filing of such Petition purely academic.

Question II in the Petition.

Question II in the Petition asks whether the Court of Appeals should exercise power to set aside its former judgment. The question is based upon the erroneous premise that Exhibit 21 is fraudulent. The order of presentation of Question I followed by Question II raises the erroneous inference that the Court of Appeals did not consider the merits of the Petition under Rule 60(b).

By the vehicle of North Star's Answer, accompanying affidavits, documents and physical exhibits of North Star ice removal tools, the Court of Appeals was fully informed and was able to decide that Exhibit 21 was truly repre-

sentative of all North Star tools; and that Exhibit 21 had the same structure, function and operation as all North Star tools.*

The Court of Appeals did exercise its power and correctly refused to set aside its former judgment by denying the Petition under Rule 60(b). (Appendix A to the Petition.)

The Court of Appeals, after considering the Petition under Rule 60(b), the evidence offered therewith, together with respondent's Answer and its accompanying proof, decided that the Petition's charges in relation to Exhibit 21 were unfounded. Question II is defective because it assumes a basic premise which is not true in fact and which was held by the Court of Appeals to be unfounded.

Question III in the Petition.

Question II recites allegations of fraud seeking relief under Rule 60(b)(3). Question III asks whether the allegations of Question II are capable of providing a basis for relief under Rule 60(b)(6) which reads "any other reason justifying relief from the operation of the judgment."

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*The decision of the Court of Appeals, March 20, 1962, held the patent limited to a knife to remove ice having a first part and a distinct second part. (Appendix C-5, C-6, C-7 to the Petition.)

Instead of such a knife, the North Star tools had a single inclined plane, a "simple flat surface sweeping the ice downwardly." (Appendix C-5 to the Petition.)

The Petition under Rule 60(b) sought to claim that North Star tools were of the two-part structure. (Record, Petition under Rule 60(b), pages 8-9.) Respondent's answer showed conclusively that all North Star tools had the single flat surface. (Record, Answer to Petition under Rule 60(b), pages 9-15.) The photographs (Petition, page 9) merely show the non-working side of the tools which do not engage ice. The Court of Appeals was fully advised of the structures by the Petition and Answer. (Appendix A-2 to the Petition.)

In regard to Rule 60(b)(6), Moore's Federal Practice, 2d Edition, Volume 7, Section 60.27(1), pg. 295, states:

> "It is important to note, however, that clause (6) contains two very important internal qualifications to its application: first, the motion must be based upon *some other reason than those stated in clauses (1)-(5)*; and second, the other reason urged for relief must be such as to *justify* relief." (Emphasis Moore's.)

Question III is only an attempt to restate Question II. Petitioners have failed to allege any reason other than the unfounded allegations of fraud in Question II.

CONCLUSION.

The Court of Appeals for the Seventh Circuit has carefully considered the grave charges of fraud and misrepresentation brought by the Petitioners. These charges (a fact question) have been denied and decided by the denial of a Petition under Rule 60(b) before the Court of Appeals. There is no substance to the charges and there is no reason which should compel this Court to grant a Writ of Certiorari. This Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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March 4, 1964.

APPENDIX I.

UNITED STATES COURT OF APPEALS

For the Seventh Circuit,

Chicago 10, Illinois.

I, KENNETH J. CARRICK, Clerk of the United States Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages contain a true copy of:

1. The printed motion of Akshun Manufacturing Company, et al., to vacate judgment under Rule 60(b), or to move that it be vacated before the District Court, or to remand to the District Court, filed in this Court on May 17, 1963.

2. The petitioners' supporting affidavits, also filed in this Court on May 17, 1963. (Since only one copy was filed, it cannot be let go.)

3. The order, entered by this Court on May 21, 1963, directing North Star Ice Equipment Company twenty days to file an answer to motion of Akshun to vacate judgment, etc.

4. The answer of North Star Ice Equipment Company, filed in this Court on June 10, 1963.

5. The emergency motion of petitioners Akshun, et al. for leave to file within twenty days a reply to respondent North Star's answer, filed in this Court on June 13, 1963.

6. The attached brief in support of said emergency motion, filed in this Court also on June 13, 1963.

7. The affidavit of Patrick H. Hume and Granger Cook, Jr. in support of said emergency motion, also filed in this Court on June 13, 1963.

8. The order, entered by this Court on July 30, 1963, denying Akshun's emergency motion for leave to file reply to North Star's answer; further denying the motion to vacate judgment, etc.

9. The motion of Patrick H. Hume and Granger Cook, Jr. for leave to withdraw immediately as counsel for Akshun, filed in this Court on October 30, 1963.

10. The order, entered by this Court on November 5, 1963, granting leave to Patrick H. Hume and Granger Cook, Jr. to withdraw as counsel for defendants Akshun, et al.

11. The request for rehearing on petition to vacate judgment under Rule 60(b), received in this Court on August 28, 1963 and filed herein on November 5, 1963.

12. The order, entered by this Court on November 5, 1963, granting leave to file late petition for rehearing and also denying the same petition for rehearing.

13. The order, entered by this Court on November 20, 1963, authorizing and directing Clerk of this Court to return defendants' physical exhibit D-10 to Clerk of the U. S. District Court to be placed in the files of cause No. 57-C-1065.

Cause No. 13443.

AKSHUN MANUFACTURING COMPANY, and V & S ICE MACHINE COMPANY, INC.,

Defendants-Appellees,

vs.

NORTH STAR ICE EQUIPMENT COMPANY,

Plaintiff-Appellant,

as the same remains upon the files and records of the United States Court of Appeals for the Seventh Circuit.

IN TESTIMONY WHEREOF I hereunto Subscribe my name and affix the seal of the United States Court of Appeals for the Seventh Circuit, at the City of Chicago, this fourteenth day of January, 1964.

KENNETH J. CARRICK, *Clerk,*
By THOMAS F. STRUBBE,
Deputy Clerk of the United States Court of Appeals for the Seventh Circuit.

(SEAL)